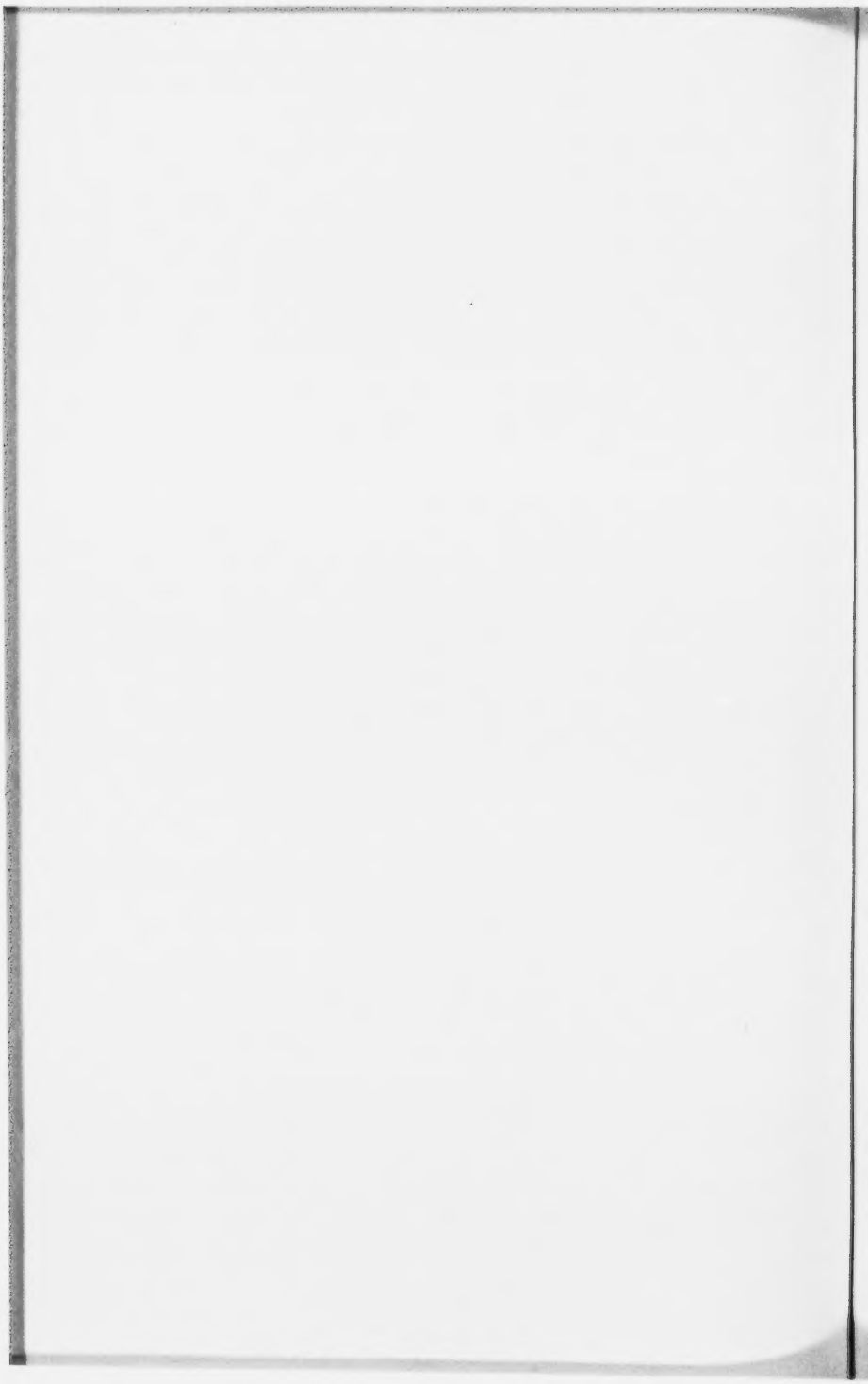

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 899

MARYLAND CASUALTY COMPANY, A CORPORATION,
Petitioner,

vs.

DIXIE PINE PRODUCTS COMPANY, A CORPORATION.

BRIEF IN SUPPORT OF PETITION.

I

The Opinion of the Court Below.

This case was not reported in the District Court. The opinion of the Circuit Court of Appeals will be found in the Record at pages 341-345, but has not yet appeared in the Federal Reports.

II

Grounds of Jurisdiction.

The jurisdiction of this Court is invoked under the Act of February 13th, 1925, Chapter 229, Section 1, 43 Stat. 938, amending and re-enacting Section 240 (a) of the Judicial

Code, 28 United States Code Annotated, Section 347, page 359. There are involved questions of peculiar gravity and of general importance. Same include lack of uniformity of decision of the Circuit Court of Appeals themselves, the construction of a contract of insurance affecting private and public interests and novel and important to both interests, and the construction and application of Rules 73 (g) and 75 (a) of Rules of Civil Procedure for District Courts promulgated by the Supreme Court of the United States, with application of principle of Due Process throughout.

III

Statement of the Case.

The petition proper through Section 1 thereof dealing with summary and short statement of the matter involved is applicable here and we call the attention of the court thereto in connection with this statement. If will be our purpose to make some additional elaboration of the evidence and court applications through the argument which follows. In addition to what has already been said we desire to point out the following important ultimate facts and conclusions.

In the outset we desire to point out that this Court has right to sustain the trial court without another trial as would be required if the judgment of the Circuit Court of Appeals should prevail. The question of right to petition for writ of certiorari before final judgment by Circuit Court of Appeals under the Act of 1891, as amended, has been explained by this Court in relatively recent decisions. In a case arising in the District Court for the Western District of Missouri there was a final judgment and an appeal to the United States Circuit Court of Appeals for the Eighth Circuit and in said Circuit Court of Appeals the trial court was reversed and the cause remanded for a new

trial. On petition for writ of certiorari to this Court it was said:

> "However, upon consideration of the particular circumstances of the case, we have concluded that a writ of certiorari ought to be allowed, without further protracting the litigation to the extent that would be necessary in order to reach final judgments; the transcript of the record and proceedings returned in obedience to the writs of error to stand as the return to the writ of certiorari." *Spiller* v. *Atchison, Topeka & Santa Fe Railway Company,* 64 L. Ed. 810-815, 253 U. S. 117-121, 40 Sup. Ct. Rep. 466. See *Gay* v. *Ruff,* 78 L. Ed. 1099, 292 U. S. 25, 92, 54 S. Ct. 608; *Rochester Telephone Corporation* v. *United States of America* (N. Y. 1939), 83 L. Ed. 1147, 304 U. S. 125, 59 Sup. Ct. 754.

From the above it would appear that there is ample of authority to support contention that the power is vested in this Court to sustain the petition and cause appropriate writ to issue to the Circuit Court of Appeals. In order that this Court may have before it a survey or concise statement of the grounds on which the jurisdiction of the court is invoked, we point out the following:

A. The Circuit Court of Appeals violated the general rules of construction, (1), in ignoring or improperly applying the exclusion of loss from fire and of loss from an accident caused by fire under the contract, and of loss from an indirect result of an accident; (2), and the court improperly applied definition of a machine under the terms of the policy to the unfired vessels covered and which definition erroneously applied involved the pipe which ruptured; (3), and the court in itself differed as to the interpretation of the contract as it applied to the existing facts. The subject matter is that of the interpretation of a form for insurance policy covering fired and unfired vessels, and the

objects to be covered are identified in a schedule, and insurance companies as well as the insureds throughout the country are interested in and desire some uniform announcement of the application of the policy to determine their rights. The question is novel and important.

B. The opinion of the Circuit Court of Appeals is in conflict with like courts in other circuits in addition to being in conflict with the concurring opinion and if the cause is tried in the District Court under the existing announcement of the law applicable, a state of confusion must of necessity exist to the detriment of the litigants and the public.

C. The Circuit Court of Appeals in this cause has violated the Fifth Amendment to the Federal Constitution and deprived your petitioner of due process of law in that there has been given a strained construction to the policy which is subject to normal interpretation and is not complex in itself and is only made complex by the use by the court of a definition intended to apply to a machine but applied to an unfired vessel.

D. The Circuit Court of Appeals in the disposition of this cause before it has ignored an unanswered and uncontested motion to dismiss the appeal of respondent. The motion to dismiss is based upon the violations of Rules 73 (g) and 75 (a) of the Rules of Civil Procedure of District Courts promulgated by the Supreme Court of the United States and of Rule 16 of said Circuit Court of Appeals. The various District Courts and Circuit Courts of Appeals are not in accord on the application of these new Federal Rules. Recent cases dealing with motions to dismiss for failure to comply with said rules are about equally divided in sustaining and overruling such motions.

IV

Specification of Errors.

A. The court erred in construction of contract and application of principles of burden of proof and sufficiency of evidence contrary to other Circuit Courts of Appeal and other courts of like authority and against uniformity of decision in the following particulars:

(1) In failing to recognize that the explosion was of a building and its contents and not of the objects covered by the policy of insurance.

(2) In holding that the fire exclusions under the terms of the insurance policy had no application.

(3) In holding that the ruptured pipe was a part of the unfired vessel covered by the policy.

(4) In holding that the testimony for respondent created a question of fact for determination by the jury.

B. The court has through opinion violated the Fifth Amendment to the Federal Constitution depriving petitioner of due process of law by making a strained and uncommon construction of the contract of insurance and the rules of law applicable thereto, and contradictory of other like courts in other circuits.

C. The Court erred in ignoring and refusing to pass upon an unanswered and uncontested motion to dismiss based upon violations of Rules 73 (g) and 75 (a) of the Civil District Courts promulgated by the Supreme Court of the United States, and against which there is no uniformity of opinion among the various Circuit Court of Appeals.

D. The Court erred in denying petition for rehearing.

V.

Summary of Argument.

Point A.

The Circuit Court of Appeals erred in construction of contract and application of principles of burden of proof and sufficiency of evidence thereto contrary to other circuit courts of like authority and against uniformity of decision.

The trial court had an opportunity to know and better understand the contract involved and the value to be placed upon the testimony furnished in connection therewith. In order that meaning may be given to the verbiage of exclusions under the contract, it was mandatory that a directed verdict be granted. Said court of appeals failed to recognize that the explosion was of a building and its contents and not of the objects covered by the policy of insurance, or to recognize that the fire exclusions under the terms of the insurance policy were applicable, and failed to apply to specially prepared part of the contract of insurance the definition of an unfired vessel so as to exclude the ruptured pipe testified about and failed to give to the trial court opinion and judgment the weight which same was entitled to under the law. In application of these principles the court divided in itself so as to cause confusion of rights of litigants involved. The opinion of said court is contrary to the law existing in Mississippi as announced by its Supreme Court and to the law on the same subject as announced by other Circuit Courts of Appeals.

POINT B.

The Circuit Court of Appeals has through opinion deprived petitioner of due process of law by making a strained construction of the contract involved and contradictory of other like courts in other circuits.

The principle of due process of law runs through our whole jurisprudence. It requires that judicial proceedings and conclusions reached in connection therewith shall follow certain standards, statewide or nationwide standards generally acceptable. In this case your petitioner has suffered property losses by the opinion complained of causing a strained and uncommon construction of the contract of insurance and the rules of law applicable thereto. A form of contract was used but there was written into the contract by the parties what was covered and it identified twenty-two turpentine extractors listed as unfired vessels. The Circuit Court of Appeals failed and refused to use the definition of an unfired vessel to determine what was covered, but instead used definition of a machine so as to include the outlet pipe which ruptured. Said court also made this application of burden of proof to decide as matter of law that question of fact was created as against other like courts in other circuits.

POINT C.

The Circuit Court of Appeals erred in ignoring and refusing to pass upon unanswered and uncontested motion to dismiss of petitioner based upon violations of Rules 73 (g) and 75 (a) of the Rules of the Civil District Courts promulgated by the Supreme Court of the United States, and contrary to conduct of other like courts.

The notice of appeal was filed on July 10th, 1942, (R. 335). No designation of contents of record was filed by

or for respondent as required by said Rule 75 (a). On July 13th, 1942, the United States District Judge extended the time for filing the record to a period of ninety days from the date of the notice of appeal (R. 337). Nothing of record was done thereafter until October 8th, 1942, when the United States District Judge signed an order sending up with the record the original exhibits. The original record was not received by the Clerk of the Circuit Court of Appeals until October 9th, 1942, or ninety-one days after the notice of appeal. This was in violation of said Rule 73 (g). There is no uniformity of opinion among the various Circuit Courts of Appeals on the application of the said rules. The Circuit Court of Appeals for the Fifth Circuit failed to take action on motion to dismiss filed for petitioner (R. 339-340). On petition for rehearing and in the Fifth division thereof your petitioner again identified the motion to dismiss and sought an expression thereon, but the court again refused to express itself on the question by denying the petition (R. 351).

VI.

ARGUMENT.

Point A.

The Circuit Court of Appeals erred in construction of contract and application of principles of burden of proof and sufficiency of evidence thereto contrary to other circuit courts of like authority and against uniformity of decision.

We are first dealing with question of the construction of the contract involved and which construction of the Circuit Court of Appeals is contrary to that followed by other courts. Elementary principles of burden of proof and of sufficiency of evidence have been violated as well as prin-

ciples of construction of contracts proper. We shall deal with the various phases thereof as pointed out in the specification of errors under Section IV of this brief:

(1) *The Court failed to recognize that the explosion was of a building and its contents and not of the objects covered by the policy of insurance.* The declaration or complaint charges that "one of the turpentine extractors," "exploded with terrific force and violence." The policy of insurance is what is called "boiler or machinery policy," and insofar as this litigation is concerned, there is covered as shown through Schedule Number 1 of the policy unfired vessels Numbered 1 to 22, inclusive "Type: Turpentine Extractors. Size: 15'8" x 5'2"'" (R. 14). In defining the unfired vessels described in the schedule it is said that " 'Accident' shall mean a sudden and accidental tearing asunder of the object or any part thereof" (R. 15-16). The insurance company contracted to pay for a loss on the property of the assured "directly damaged by such accident" (R. 6).

There is no doubt under the testimony but that there was leaking gas at some place in the extractor building and this gas was both in liquid and gaseous form. The gas continued to flow in the building for twenty-five to thirty minutes before it caught on fire. The gas did catch on fire and there was an explosion of the building. The explosion, as pointed out in the opinion of the trial judge, which caused the damage, was in no way an explosion of the extractor or any part of it. It was an explosion of gaseous substances outside the objects covered by the insurance policy. The automatic sprayer was running for a long time before the fire (R. 307). The gas in liquid form was picked up in buckets and water was being sprayed next to the boiler room to keep the gases therefrom (R. 308-309). What occurred was that the gas reached the boiler room fire and became ignited and the flames were transported back to the

saturated building wherein the twenty-two extractors were located and an explosion followed. The accident did not involve an extractor as per respondent's pleadings, but it involved a building wherein the extractors were located. The explosion was from without and not from within. The court in the opinion here complained of failed to recognize this principle and in conflict with other Circuit Courts of Appeals and with the court holdings in Mississippi.

> "An insurance contract, like any other contract, if perfectly plain and unambiguous, should be construed as written." *Continental Casualty Co.* v. *Hall,* 80 So. 335, 118 Miss. 871. See also *Brown* v. *Powell,* 94 So. 457, 130 Miss. 496; *Lavender et al.* v. *Volunteer State Life Ins. Co.,* 157 So. 101, 171 Miss. 169; *New York Life Ins. Co.* v. *Nessossis,* 196 So. 766, 189 Miss. 414.
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> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense." *Davies* v. *Hartford Fire Ins. Co.,* (C. C. A. 8 Cir.) 75 F. (2d) 442.

(2) *The Court failed to give application to the fire exclusions under the terms of the insurance policy.* Your petitioner pleaded these exclusions (R. 38). Section 1 of the insurance agreement covered loss on the property of the policy holder directly damaged by "such accident" but it excluded loss from fire and loss from an accident caused by fire (R. 6). The definition of the word "accident" is that it shall be a sudden and accidental tearing asunder of the "object" (R. 15). The object is the extractor which respondent alleged exploded. The Circuit Court of Appeals involved took the position that the fire exclusion had no application because the fire started from the boiler. There appears to be much of conflict among the authorities as to what application, if any, should be given to the fire exclu-

sions found in insurance policies of the nature here involved. The gas was an explosive and the courts recognize that when gasoline vapor reaches a flame, it will become ignited. In the case at bar the ignited vapor had to burn through a space of thirty feet before the building was reached where the explosion occurred, but the fire traveled through the vapor to the building where the explosive mixture was ignited. This is recognized by the trial court and the court of appeals (R. 326 and R. 342). The point we are trying to make is that state courts and Circuit Courts of Appeals are not in accord on value to be placed on fire exclusions.

> "From all which it appears that where gasoline vapor is ignited at some distance from the point of origin, the flame will be transported back by the vapor to the point of origin, and if a mixture of sufficient concentration exists a major explosion will be caused." *Lancashire Shipping Co.* v. *More Dry Dock & Repair Co.*, 43 F. (2d) 750 (Case originated District Court Eastern Division New York and affirmed by C. C. A. 2 Cir., without written opinion, 48 F. (2d) 1077, and certiorari denied 76 L. Ed. 546).

It must be remembered that the Circuit Court of Appeals in this case held that the fire which ignited the explosive solvent was a friendly fire and it stated further that "the fact that the explosion was touched off by fire is of no significance, since it was a friendly fire confined to and burning in a place where the parties contemplated it would be" (R. 344). The Court identified in support of this conclusion the case of *German S. & L. Soc.* v. *Commercial U. Assurance Co.*, 187 Fed. 758. In that case the defense was that the fire was caused either directly or indirectly by an earthquake. It was a fire policy and earthquakes and explosions were excluded. It was concluded that the explosion was a mere incident of the fire and that the earthquake was not

an independent cause of the fire. We have the exact converse here, but the Circuit Court of Appeals did not so hold. It must be remembered in this case, however, that the respondent collected approximately $80,000.00 from the fire insurance companies growing out of the occurrence (R. 186). It was evidently there contended that the loss resulted from fire and not from an explosion. The Circuit Court of Appeals had before it the brief of respondent identifying cases of *American Steam Boiler Insurance Co.* v. *The Chicago Sugar Refining Co.*, 57 Fed. 294 (C. C. A. 7 Cir.), *Hartford Steam Boiler Inspection and Insurance Co.* v. *Pabst Brewing Co.*, 201 Fed. 617 (C. C. A. 7 Cir.), and *Hagemeyer Trading Co.* v. *St. Paul Fire & Marine Insurance Co.*, 266 Fed. 14 (C. C. A. 2 cir.). These cases may not be altogether in point but they do lend some argument to the contentions of the opposition and have evidently been sufficient to mislead the Circuit Court of Appeals, thereby justifying the conclusion on our part that the law is not sufficiently well settled on the subject to avoid the appellate courts from being misled.

We are here dealing with losses resulting from fire or from an accident caused by fire. Just because the fire which originates the explosion is an innocent or friendly fire should not make it the less applicable to the exclusion. The exclusion should be given a literal interpretation and not a strained construction as was done by the Circuit Court of Appeals here.

> "In Webster's Dictionary 'fire' is defined as 'the evolution of light and heat in the combustion of bodies.' No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning given to the word." *Western Woolen Mill Co.* v. *Northern Assur. Co. of London*, 139 Fed. 637, (C. C. A. 8 Cir.).

The Supreme Court of Missouri has recognized that an existing fire insurance policy without exclusions would cover all loss and even explosion loss provided the explosion was caused by either an accidental or hostile fire or by a purposeful or friendly fire.

> "It is seldom conflagrations originate from other causes than that of an innocent and lawful fire. It is impossible to draw a distinction between a fire communicated from a gas jet, a lamp, or a stove to tangible combustibles and one communicated by the same agencies to intangible inflammable vapor or gas." *Renshaw* v. *Missouri State Mutual Fire & Marine Insurance Company,* 103 Mo. 595, 15 S. W. 945.

The Massachusetts court has said of the same subject:

> "The only difference in the elements of the question is, that the gunpowder when ignited consumes with more of rapidity than sulphur, and the combustion is accompanied or followed by explosion. Still, the agent is fire, though it acts in different ways upon the different successive subjects of its action, beginning with the match and terminating with the plaintiff's house." *Scripture* v. *Lowell Mutual Fire Ins. Co.,* (Mass.) 10 Cushing 356, 57 Am. Dec. 111-118.

In a case originating in the State of Kentucky and reaching the Supreme Court of the United States there was involved a fire begun by a lighted candle or lamp which ignited gunpowder. The court speaking through Mr. Justice Storey said:

> "Some suggestion was made at the bar whether the explosion, as stated in the pleas, was a loss by fire, or by explosion merely. We are of opinion that, as the explosion was caused by fire, the latter was the proximate cause of the loss." *William Waters* v. *The Merchants' Louisville Insurance Company,* 9 L. Ed. 691. See also *Renshaw* v. *Missouri State Mutual F. & M. Ins. Co.,* 103 Mo. 595.

Other cases on the same subject but opposing the conclusion reached by the court and here complained of announced the principle as follows:

> "The damage in this case was clearly occasioned by fire, although the building was not consumed thereby. The explosion was not due to chemical action, but to fire, and we think the loss or damage was by fire within the meaning of the policy in suit." *Furbush* v. *Consolidated Patrons' & Farmers' Mut. Ins. Co.*, 140 Iowa 240, 118 N. W. 371. See also *Scully* v. *Brewer County F. M. F. Ins. Assn.*, 215 Iowa 368, 245 N. W. 280.

We have here sought to say that the trial court was justified in concluding that the loss resulted from a fire or an accident caused by fire as per exclusions under Section 1 of the insurance policy (R. 6). We do recognize, however, that there is some of confusion among the courts and it is rather difficult to determine what some of the Circuit Courts of Appeals have intended to say on the subject. There is another exclusion under the terms of the policy which should have protected petitioner against loss and we shall attempt to deal therewith next hereafter and thereafter seek to point out why the several questions identified under this section of the argument are of such importance and novelty and of such private and public interest as to make it highly desirable, if not necessary, for this court to give full expression thereto.

(3) *The Court was in error in holding that the ruptured pipe was a part of the unfired vessel covered by the policy.* The Circuit Court of Appeals held that, "The policy listed the 22 extractors as unfired vessels, and defined the object with respect to unfired vessels to mean the complete group of such vessels including interconnecting pipes, gages, and safety valves;" and the court took the position that the pipe which ruptured was an inlet or outlet pipe (R. 343).

In reaching this conclusion the court failed to apply the definition of an unfired vessel but used the definition of a described machine (R. 15). It was not a machine which was covered by the terms of the insurance policy but unfired vessels instead (R. 14). The part of the policy identified as Schedule Number 1 dealing with unfired vessels was built up by the insurer and insured and constitutes the written part of the contract as against that in the printed form. If the contracting parties had intended to identify the definition of a machine to the twenty-two extractors, the schedule identifying same as unfired vessels would not have been used. Since the schedule dealing with unfired vessels became and was the written portion of the contract as against the printed parts, same must have greater weight and the definition to be used must be that of an unfired vessel which does not include interconnecting pipes or inlet or outlet pipes.

> " 'The reason why greater effect is given to the written than to the printed part of a contract, if they are inconsistent, is that the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use, without reference to particular objects and aims.' *Hagan* v. *Scottish Inc. Co.,* 186 U. S. 423, 22 S. Ct. 862, 46 L. Ed. 1229; *C. C. Mengel & Bro. Co.* v. *Handy Chocolate Co.* (C. C. A.) 10 F. (2d) 293; *Lipschitz* v. *Naps Fruit Co.* (C. C. A.) 223 F. 698, loc cit. 704." *Deutschle* v. *Wilson et al.,* (C. C. A. 8 Cir.) 39 Fed. 2d 406.

Attorney Wills as witness for respondent, identified the ruptured pipe as an inlet to the header (R. 80). Witness T. F. Dreyfus for respondent identified the two inch copper pipe which ruptured about thirty minutes before the explosion as beginning about twenty-four inches from the extractor (R. 116), and running twenty-five or thirty feet before it reached the header (R. 118), and Witness Dreyfus for

respondent further testified that when the two inch copper pipe reached the header, it led to the condenser (R. 119). None of respondent's witnesses were eye witnesses to the accident.

Albert White furnished undisputed testimony that the pipe which first ruptured was carrying gas from the extractor through the header to the condenser (R. 320). A strict construction of the policy in favor of respondent would require the conclusion that the ruptured pipe was no part of the extractor covered under the terms of the policy.

It is true that there was some testimony to the effect that the extractors would not operate as such without pipes, but this in itself would not make liability as has been pointed out rather uniformly by the courts:

> "It is argued that the 'feed water heater' is a necessary and important part and connection in the generation of the steam at this plant, and therefore is a part of the 'steam boiler' here, within the meaning of the policy. It may be conceded that the heater is a necessary and important part and connection in the generation of steam at this plant, but so is the surge tank; so is the gravity pipe between the surge tank and the 'feed water heater'; so is the boiler feed pump and its connected pipes, and so, also, are the furnaces and the smokestack. No steam could be generated in this plant without the immediate use of all of these connected parts. They, with the boiler, make up the heating plant proper, but this insurance is not for the explosion of any part of a steam plant but of a particular, designated and named element of that plant, to wit, a 'steam boiler', and the steam boiler of this plant did not explode. There is no room for any liberality of construction which might broaden the meaning of the term used in the policy, because there is no ambiguity in the term used in the policy and no difficulty in applying that term to the undisputed facts shown here." *Hadley* v. *Continental Casualty Co.,* (C. C. A. 8 Cir.) 51 F. 2d 1046.

> "Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary, and popular sense." *Davies* v. *Hartford Fire Ins. Co.,* (C. C. A. 8 Cir.) 75 F. 2d 442.

Respondent evidently caused the Circuit Court of Appeals in this case to follow a different rule of law, as would appear from the opinion of Circuit Judge Holmes and the concurring opinion of Circuit Judge Sibley. Respondent has contended before the court that a policy or contract of insurance is to be construed liberally in favor of the insured and strictly against the company and it is by inference argued that the court should cause pipes to be considered under the terms of the policy a part of the extractors. There are some court holdings because of loose language or otherwise which have rather indicated that a different construction ought to be had on insurance policies than on other types of contracts. The opposition has cited the cases of *Mer Rouge State Bank* v. *Employers Liability Assurance Co., Ltd.,* (C. C. A. 5 Cir.), 270 Fed. 567 and *Imminent Household Columbia Woodmen* v. *Burch,* 115 Miss. 512. There is sufficient of conflict on the subject between Circuit Courts of Appeals to justify an expression by this Court.

(4) *Court was in error in holding that the testimony for respondent created a question of fact for determination by the jury.* This holding of the court is not quite clear because the principal opinion and the concurring opinion are not in accord. The principal opinion is very much limited by the concurring opinion. A casual reading of the concurring opinion would justify the conclusion that Circuit Judge Sibley was almost persuaded that the trial court should be affirmed. Quite a different approach to the subject was de-

termined by Circuit Judge Holmes. As a preface to the analysis of the sufficiency of the evidence, the scintilla of evidence rule does not prevail in Mississippi. The rule is well expressed in a Mississippi case as follows:

> "The scintilla of evidence rule has been discarded in nearly all jurisdictions, and is not recognized in this state; but verdicts must be based upon substantial evidence and that evidence must be reasonably believable. Whatever a jury here or there might chance to believe we must require that the evidence upon which they act must be within state-wide legal standards, and one of these, as said, is that the evidence must be substantial and must be reasonably believable." *Y. & M. V. R. Co.* v. *Lamensdorf,* 180 Miss. 426, 177 So. 50.

In this case the burden of proof in the trial court was on respondent to show by competent testimony that there was a sudden and accidental tearing asunder of the object identified in the pleadings to do damage. The Circuit Court of Appeals in the first sentence of the second paragraph of opinion announced that, "There is no substantial dispute as to how the accident occurred" (R. 342). In view of this announcement the Circuit Court of Appeals of the Fifth Circuit in the opinion here involved created a conflict between Circuit Courts of Appeals and State Supreme Courts on the duties and obligations of a trial judge. It must be remembered that some discretion is left with the trial judge. He knew in this case that respondent had eye witnesses to the accident but furnished none of them. He knew that the burden of proof was on respondent and that the only specific facts were furnished to the court by petitioner and respondent's witnesses only dealt in generalities. It is true that there are disputes in the various State Supreme Courts and with the Circuit Courts of Appeals, but the better reasoned cases require conclusion, as we view it,

that there was no substantial testimony furnished for respondent to go to the jury.

> "Where there is no controversy as to the facts the question of negligence is for the court; otherwise it is for the jury." *Thomas* v. *Electric Company,* 46 S. E. 217, 54 W. Va. 395.
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> "It is the duty of the court to direct a verdict in favor of a party where the evidence so clearly preponderates in his favor that the court, in the exercise of sound judicial discretion, would be obliged to grant a new trial if the jury should decide in favor of the other party." *Maryland Casualty Co.* v. *Crofford* (C. C. A.) 55 F. 2d 576, 577.
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> "It is the trial court's duty to direct a verdict at the close of the evidence, where evidence is undisputed or where evidence, though conflicting, is so conclusive that the court, in the exercise of sound judicial discretion, ought to set aside a verdict in opposition to it." (C. C. A.) *Farr Co.* v. *Union Pac. R. Co.,* 106 F. 2d 437. See also *National Mutual Casualty Company* v. *Eisenhower,* 116 F. 2d 891, and *Minnesota & Dakota Cattle Company* v. *Atchison, Topeka & Santa Fe Railway Company,* 52 L. Ed. 931.

The Circuit Court of Appeals for the Sixth Circuit has said of the proposition where there is no substantial dispute in the evidence that:

> "A mere scintilla of evidence is not enough to require submission of an issue to jury, and in every case before evidence is left to jury, there is a preliminary question for judge whether there is any evidence upon which jury can properly find a verdict for the party producing it upon which burden of proof is imposed, and not whether there is literally no evidence." *Mutual Benefit Health and Accident Assn.* v. *Snyder,* 109 F. 2d, 469.

In the foregoing discussion we have sought to say and demonstrate to this Court that there is here involved questions of novelty and importance, of public and private interests, and involving burden of proof and uniformity of decisions and the construction of a simple contract. These are questions which this Court has sought to unravel for the various State Supreme Courts and Circuit Courts of Appeals where there have been complexities, and we earnestly urge upon the Court that this is one of that class of cases where the Court should call for the record and dispose of same in its entirety and with full and early justice to all and without prejudice to any because of the conflicting views of the Circuit Court of Appeals itself. Limited space will be used to furnish some examples where petitions have been allowed and involving similar questions as here discussed.

> "The questions in this case are novel and important. They arise on the foreclosure of certain railroad mortgages, and suggest to what extent the same rules and considerations obtain in them as in the foreclosures of ordinary mortgages upon real estate." Louisville Trust Company, *v.* Louisville, New Albany & Chicago Railway Company et al., 43 L. Ed. 1133, 174 U. S. 674.
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> "It seems to us that both the private interests of the railroad companies and of the separate industries and the greater interests of the public call for the granting of the writ of certiorari, and it is therefore ordered." St. Louis, Kansas City, & Colorado Railroad Company, *v.* Wabash Railroad Company and City of St. Louis, 54 L. Ed. 752-755, 217 U. S. 247.
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> "The cases are here upon writs of certiorari which were granted because the ground upon which the circuit court of appeals put its decision—the construction and application of some of the mineral land laws—was deemed of general interest in the regions where those laws are operative." George A. Cole et al. *v.* Joseph Ralph, 64 L. Ed. 567-574, 252 U. S. 286-289.

POINT B.

The Circuit Court of Appeals has through opinion deprived petitioner of due process of law by making a strained construction of the contract involved and contradictory of other like courts in other circuits.

We have in a large measure heretofore expressed our view respecting the construction given to the contract by the Circuit Court of Appeals. That court tied itself to a definition of a machine and ignored the definition of an unfired vessel and applied the machine definition to the unfired vessel schedule. If this construction had not been given to the contract, the pipe could not have been considered a part of the object and no recovery under any theory could have been sustained.

It is generally pointed out that due process of law means the application of laws and the administration thereof as they exist. It has been said that the Constitution provides that the citizen should not be deprived of his property except by the law of the land. The Judicial Department of our Government has no more right to take away from an individual his property than does the Legislative or Executive Departments of the Government. One court has said of the subject:

> "'Process of law' in its broad sense means law in its regular course of administration through courts of justice, and that is but another way of saying that every man's right to life, liberty, and property is to be disposed of in accordance with those ancient and fundamental principles which were in existence when our Constitutions were adopted." Ives *v.* South Buffalo Ry. Co., 201 N. Y. 271-293, 94 N. E. 431.

On the same theory the Circuit Court of Appeals arbitrarily held that even though the explosion was caused by a fire, still this would have no application because the

fire was a friendly fire (R. 344). The contract entered into between the parties covered damages resulting from an accident but specifically excluded losses from fire or from an accident caused by fire or from an indirect result of an accident (R. 6). The Circuit Court of Appeals refused to consider these exclusions or any of them and held that the fire was a friendly fire, and that those entering into the contract did not intend to consider a fire of this kind. The court recognized that approximately thirty minutes passed from the rupture of the pipe until explosion was had, and that the explosion would not have occurred except for inflammable gases coming in contact with a fire, but with conclusion that the fire must be a hostile fire to be applicable all exclusions were ruled out. This constituted a strained and unreasonable construction of the contract and violated the Constitutional rights of your petitioner. The holding of the court was in itself judicial legislation to the detriment of petitioner and should not prevail.

In connection with the discussion here made it should be recognized that if the judgment of the Circuit Court of Appeals in this case prevails, the trial court will be in utter confusion. There is no way to reconcile the positions taken by the judge writing the principal opinion and by the judge writing the concurring opinion. The concurring opinion is certainly a limitation on the principal opinion and in its last analysis planks itself on the proposition that the undisputed testimony of Albert White, witness for petitioner, is contradicted by the wrecked pump, a silent witness. We contend that negative testimony for a plaintiff cannot overcome positive proof of a defendant and that, with the burden of proof on the plaintiff, the holding even in the concurring opinion respecting the wrecked pump and issue said to be created thereby against this positive testimony constitutes a violation of petitioner's Constitutional right to due process.

POINT C.

The Circuit Court of Appeals erred in ignoring and refusing to pass upon unanswered and uncontested motion to dismiss of petitioner based upon violations of Rules 73(g) and 75 (a) of the Rules of the Civil District Courts promulgated by the Supreme Court of the United States, and contrary to conduct of other like courts.

In this case there was filed a motion to dismiss the appeal and which motion was based on three grounds, (1), that District Court Rule Number 73 (g) had not been complied with, (2), that Rule 16 of the Circuit Court of Appeals had been violated, and (3), that District Court Rule Number 75 (a) had not been followed (R. 339). The Court in the opinion failed to consider the motion to dismiss or to furnish any announcement in connection therewith. Thereupon, in motion for rehearing and as the Fifth Section thereof, it was pointed out that the motion to dismiss should have been sustained (R. 349). In denying the petition for rehearing the court again failed to speak on the motion to dismiss (R. 351). It will be our purpose to here deal only with the violations of Rules 73 (g) and 75 (a) of the Civil District Courts promulgated by the Supreme Court of the United States and in the order here mentioned.

(1) Rule 73 (g).

The court rule here involved deals with appeals to a Circuit Court of Appeals. It is there provided for notice of appeal which in this case was filed on July 10th, 1942 (R. 335). The record discloses that on July 13th, 1942, the United States District Judge signed an order extending the time for filing the record on appeal and docketing the action to a period of ninety days from the date of the notice of appeal (R. 337). The record further discloses that on October 8th, 1942, the United States District Judge signed

an order directing that the original exhibits be sent up with the record to the Circuit Court of Appeals (R. 337). This order of the trial judge was signed just exactly ninety days from the date of the filing of the notice of appeal. The record discloses that it was received in New Orleans on October 9th, 1942, or ninety-one days from the date of the filing of the notice of appeal. (See front page or binder of transcript of record.) The question arises as to whether or not Rule 73 (g) is directory or mandatory. Circuit Courts of Appeals are not in accord in efforts to construe the same. The rule first provides that the record shall be filed and the action docketed within forty days from the date of the notice of appeal and then the rule provides:

> "In all cases the district court in its discretion and with or without motion or notice may extend the time for filing the record on appeal and docketing the action, if its order for extension is made before the expiration of the period for filing and docketing as originally prescribed or as extended by a previous order; *but the district court shall not extend the time to a day more than 90 days from the date of the first notice of appeal.*" Rule 73 (g).

These rules are relatively new and in the beginning it would appear that district courts and the circuit courts of appeals were slow to take action on the rules which may be considered drastic. The question is an important one as to what value the rules should have or how they should be applied. This Court has sustained a number of petitions for writs of certiorari only to construe some of the Federal Court Rules. However, in our own investigation we have failed to find where this Court has interpreted or passed upon the application of either Rule 73 (g) or 75 (a) here involved. In the case of *Montgomery Ward & Company* v. *Luther M. Duncan,* 85 L. Ed. 147, 311 U. S. 243,

this Court sustained petition for writ of certiorari to determine the appropriate procedure under Rule 50 (b) of the Federal Rules of Civil Procedure. A like course with similar subject matter was followed in case of *Berry* v. *United States of America,* 85 L. Ed. 945, 312 U. S. 450. See also *Nye and Mayers* v. *United States of America and W. B. Guthrie,* 85 L. Ed. 1172, 313 U. S. 13. There are numbers of these cases and it would appear in all of them that this Court has recognized that the rules promulgated by this Court under Act of Congress will be and become valuable in disposition of causes only in proportion to their rightful administration. It, therefore, becomes the more important that some expression be given by this Court on the rules here involved since the courts of appeals are not in accord and this Court has not spoken on the particular point and subject here raised.

In a hurried review of the authorities we have easily located four cases decided by courts of appeals where motions to dismiss have been sustained for violation of Rule 73 (g); and we have also found exactly the same number of decisions of courts of appeals where motions to dismiss have been overruled for violation of Rule 73 (g). It has been interesting and odd in this tabulation of ours to find that the appellate courts have been so nearly equally divided in their views as to the application to be given to the rule. It must be remembered in this case that the court below did not act upon the motion and there was given no reason nor explanation as to why the record was not filed as the rule requires within the ninety days or earlier. We are inclined to think that the better reasoned cases have held that motions to dismiss ought to be sustained where the rule has not been complied with.

This rule has been the basis for dismissal of causes on appeal in the Circuit Court of Appeals for the Third Cir-

cuit, the Eighth Circuit and the Tenth Circuit, and the Fourth Circuit.

> "The notice of appeal was dated March 21, 1941. The record of appeal was filed in this court May 9, 1941. Rule 73 (g) of the Rules of Civil Procedure, 28 U. S. C. A. following section 723c, requires the record on appeal to be 'filed with the appellate court and the action there docketed within 40 days from the date of the notice of appeal.' " *Lopata et al.* v. *Handler et al.* (C. C. A. 10 Cir.) 121 F. (2d) 938. See *Robertson, Collector of Internal Revenue,* v. *Morganton Full Fashioned Hosiery Co.* (C. C. A. 4 Cir.), 95 F. (2d) 780; *Wendel* v. *Hoffman et al.* (C. C. A. 3 Cir.), 104 F. (2d) 56; and *Leimer* v. *State Mut. Life Assur. Co. of Worcester, Mass.* (C. C. A. 8 Cir.), 106 F. (2d) 793.

The case quoted from above was disposed of by sustaining of motion. The rule involved was literally interpreted and applied. The Circuit Court of Appeals in other circuits have followed the same general construction. However, there are courts in some of the circuits following a different view including the Circuit Court of Appeals for the Fifth Circuit and against which the writ is here sought.

We shall quote from a case going before the United States Court of Appeals for the District of Columbia where there was evidently some justification for the delay in view of the language used. The court said:

> "We think it timely to advise the bar that we intend to exercise sparingly our discretion to save an appeal prosecuted in disregard of the rules. For notwithstanding the modern trend, which we fully approve, it is desirable that courts and counsel bear in mind Justice Story's admonition that 'infinite mischief has been produced by the facility of courts of justice in overlooking errors of form.' " *Burke* v. *Canfield et al.*, 111 F. (2d) 526.

In the case now before the Court it must be remembered that the opposition has done nothing to explain the delay or to justify same. The Circuit Court of Appeals for the Sixth Circuit and most of the other appellate courts seem to hold that some excuse must be given for delay if the motion to dismiss is to be overruled.

> "The rules here in question have not been construed heretofore and in order to expedite the decision of cases, the simplification of procedure and the administration of justice, consistent with their purpose, we are satisfied that under the circumstances of this case, failure to file the record in the case at bar was excusable and the motion to dismiss on that ground is denied." *Mutual Benefit Health & Accident Ass'n* v. *Snyder* (C. C. A. 6 Cir.), 109 F. (2d) 469. See also *Miller* v. *United States* (C. C. A. 7 Cir.), 117 F. (2d) 256, and *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3 Cir.), 104 F. (2d) 83.

(2) Rule 75 (a).

In this case there was a total failure of respondent on appeal to do anything required under the Federal Court Rules of Civil Procedure other than to file notice of appeal and bond. The motion to dismiss was based in part upon failure of respondent to file "designation of contents of record on appeal" as required by said Rule 75 (a). There were and are all sufficient reasons for the existence of this rule and if same is to serve its purpose, it must be literally complied with. In this particular case there were a great number of exhibits to the testimony of the several witnesses. Same are not a part of the printed record and would not have been before the Circuit Court of Appeals except for the order of October 8, 1942. (R. 337). To the testimony of Attorney T. J. Wills, representing respondent, there were introduced nine pictures, one drawing and a piece of pipe. (R. 47, 51 and 55). These exhibits are re-

ferred to in the opinion of the court of appeals and in the concurring opinion but same are not a part of the record because no arrangements were made therefor through a designation which ought to have been filed. This is another instance where the various Circuit Courts of Appeals are in discord as to whether or not the designation of contents of record must be filed, or if it is elective and subject to be waived. We contend that it was and is mandatory and for this reason alone the cause should have been dismissed, but the Circuit Court of Appeals did not agree with us. In this the Circuit Court of Appeals has differed substantially with courts in other circuits; but it has some company in the holding which ignored the motion to dismiss as will appear from the reported cases. Some of the courts of appeals have dismissed appeals because of failure to comply with said Rule 75 (a). In dismissing an appeal for non-compliance, the court for the Tenth Circuit said:

> "On April 28, 1941, the plaintiffs filed in the trial court a designation of the record on appeal. A copy thereof was not served either upon the individual defendants or the corporation. The designation did not include the complete record and the plaintiffs did not file nor serve upon either the corporation or the individual defendants a concise statement of the points on which they intended to rely on the appeal. The plaintiffs, therefore, failed to comply with Rule 75 (a) and (d) of the Rules of Civil Procedure." *Lopata et al.* v. *Handler et al.* (C. C. A. 10 Cir.), 121 F. (2d) 938. See *Miller et al.* v. *Schlesinger* (C. C. A. 8 Cir.), 111 F. (2d) 897; *Leimer* v. *State Mut. Life Assur. Co. of Worcester, Mass.* (C. C. A. 8 Cir.), 107 F. (2d) 1003; and *Robertson* v. *Morganton Full Fashioned Hosiery Co.* (C. C. A. 4 Cir.), 95 F. (2d) 780.

There are a number of cases where a different conclusion has been reached and where it has been held that prejudice must be shown to result from the failure to file designa-

tion of contents of record before appellate court will favorably act upon a motion to dismiss and there are other reasons assigned by some of the courts as an excuse for not applying the rules as written.

> "But any action which we take upon the suggestion of appellee must be predicated upon a violation of the Rules of Civil Procedure; and as already stated the purpose of the particular provisions which have been violated by appellant is to protect the appellee against an inadequate record on appeal. Appellee, however has not suggested that her cause on appeal was in any way prejudiced by the failure of appellant to either serve, or file with the clerk, a concise statement of the points to be relied upon on appeal. In the absence of any claim of injury, we do not feel justified in dismissing the appeal." *Keeley* v. *Mutual Life Ins. Co. of New York* (C. C. A. 7 Cir.), 113 F. (2d) 633. See *Sampsell* v. *Anches et al.* (C. C. A. 9 Cir.), 108 F. (2d) 945, and *Middleton et al.* v. *Hartford Acc. & Indemnity Co.* (C. C. A. 5 Cir.), 119 F. (2d) 721.

From all of the above it can be appreciated that the courts are in hopeless confusion on application of rules 73 (g) and 75 (a) of the Civil District Courts promulgated by the Supreme Court of the United States. It would appear that the better reasoned cases require a reasonable construction of the rules and a reasonable compliance therewith, but some of the courts of appeals permit excuses to be made to justify non-compliance and others go so far as to pay no attention to motions to dismiss as was done in this case by the Circuit Court of Appeals for the Fifth Circuit, and this in spite of the fact that nothing required under Rules 73 and 75 was done other than to file the notice of appeal and the bond. When motion to dismiss was filed with the Circuit Court of Appeals, the contents thereof were not denied and no explanation whatsoever was made by re-

spondent; but the motion remains unanswered by respondent, ignored by the court, and in effect denied or overruled.

VII

Conclusion.

It is respectfully submitted that the errors of the Circuit Court of Appeals above discussed in placing a strained construction under the contract and in ignoring the motion to dismiss are such as to call for review and determination by this Honorable Court in order that justice may be done to petitioner. In this connection we desire to say that Section 1 (a) and 1 (b) and 1 (c) of the policy of insurance are to be given a reasonable interpretation. The question was earnestly argued in the Circuit Court of Appeals that the pipe complained of as rupturing and of which Exhibit 7 came was an outlet pipe leading from the end of a T-joint to a header and from thence to a condenser. The Schedule which identified what was covered under the policy mentioned only unfired vessels. Unfired vessels are defined and the definition includes no pipes. Pipes are not mentioned in the definition proper and are excluded. We earnestly urge upon this Court that under the terms and provisions of the policy of insurance involved pipes would not be covered even though they were parts of the unfired vessels, because they were outlet pipes, but the definition agreed upon between the parties and heretofore identified does not define the vessels to include the pipes. The court on appeal had to use the definition of a machine to cause the accident complained of to be covered by the policy. No such strained construction could have been intended.

The courts of appeal of the several circuits are not in accord on interpretation of policies of this kind. The construction given by the trial court deprived your petitioner of his constitutional rights of due process. The courts are

not in accord on application of said Rules 73 (g) and 75 (a); but we believe and earnestly urge upon the court that the petition for writ of certiorari should be sustained and the appeal from the District Court either dismissed or after full hearing the holdings of the District Court affirmed.

Respectfully submitted,

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